



Hurry Up and.... Wait? What Your Campuses Can and Should Do Now With Your Title IX Policies and Procedures

NCICU Joint Session with
Student Affairs Deans and Vice
Presidents, Chief Academic Officers,
and HR Directors

Bennett College

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Title IX Proposed Regulations: Key Concepts

Timeline for Title IX New Regulations

- Proposed regs released June 23, 2022 (50th anniversary of Title IX)
- NPRM published in Federal Register July 12, 2022
- 60-day comment period ends September 12, 2022
- Final Rule TBD

Key Concepts

- Broadens obligations of institutions to respond to sex discrimination
- Protections apply regardless of gender, gender identity, or sexual orientation
- Easier to initiate complaint process
- Informal resolution options permitted and expanded
- Live hearings not required but live questioning in some form likely here to stay
- Requires training for all employees

Recent Case Law Developments

Cummings v. Premier Rehab Keller, P.L.L.C., 596 U. S. _____, 14 S. Ct. 1562 (2022). In a 6-3 decision, the U.S. Supreme Court held that individuals suing under the antidiscrimination provisions of either the Rehabilitation Act or the Patient Protection and Affordable Care Act are not entitled to damages for emotional harm suffered. The Court found that the same was true for private actions under either of the other two statutes that prohibit recipients of federal funds from discriminating on the basis of race, color, national origin, sex, disability, or age: i.e., Title VI and Title IX.

Doe v. Purdue Univ., No. 4:18-CV-89-JEM, 2022 WL 124645 (N.D. Ind. Jan. 13, 2022). Female students filed an eight-count complaint against the University and several administrators alleging they were wrongfully suspended for filing sexual assault complaints against male students. The students alleged that the University failed to inform them that any determination of negative credibility of their own statements during the investigation could result in sanctions, failed to conduct an independent investigation into the alleged false statements, and expelled them in retaliation for complaining about the assault. In denying summary judgment, the Court found that material disputes remained. Specifically, the Court held that alleged procedural flaws in the investigation, including failure to notify the female students that the panel was investigating their conduct and asking certain “objectively offensive” questions of possible victims could constitute deliberate indifference on the part of the University, and whether a sexual assault report could constitute protected activity to support a retaliation claim under Title IX.

Recent Case Law Developments, cont.

Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020). The Court of Appeals for the Fourth Circuit held that school board policy requiring students to use bathrooms that correspond to their biological sex violated transgender male students' rights under Title IX and the Equal Protection Clause.

Feminist Majority Foundation v. Hurley, 911 F.3d 674 (4th Cir. 2018). The Court of Appeals for the Fourth Circuit affirmed the dismissal of Feminist United's section 1983 claim and the Title IX retaliation claim against President Hurley and vacated and remanded the Title IX sex discrimination and the Title IX retaliation claims against the University. The Feminist United organization at the University of Mary Washington (UMW) questioned a decision by the student senate that authorized male-only fraternities and were met with backlash and harassment from other UMW on the social media app, Yik Yak. Feminist United members reported their concerns to UMW's Title IX Coordinator. The district court found that the sexual harassment of Feminist United "took place in a context over which UMW had limited, if any, control" and that UMW was not deliberately indifferent because they "t[ook] some action, such as holding listening circles and sending a campus police officer to attend two student events." The Fourth Circuit found there was substantial control and deliberate indifference sufficient to meet Title IX sex discrimination and retaliation claims because the harassment occurred within the vicinity of the campus, UMW's network was used to make posts on the app, and there were sufficient actions that UMW could have taken to redress the harassment. The Court held that "we cannot conclude that UMW could turn a blind eye to the sexual harassment that pervaded and disrupted its campus solely because the offending conduct took place through cyberspace."

Recent OCR Guidance

- Discrimination Based on Pregnancy and Related Conditions: A Resource for Students and Schools (October 2022)
 - Addresses prohibition against discrimination/exclusion based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom related to medical benefits and services, leave policies, etc.
- Resolution Agreement, OCR Complaint No. 08-22-2021, Salt Lake City Community College (June 2022)
 - Violations of Title IX and Section 504 related to failure to address student complaint of pregnancy discrimination by an instructor and failure to excuse pregnancy-related absences
- Fact Sheet: Supporting Intersex Students (October 2021)
 - Addresses protections against discrimination for failure to fit stereotypical views about men or women
- Fact Sheet: Confronting Anti-LGBTQI+ Harassment in Schools (June 2021)
 - OCR and DOJ may enact enforcement against schools that fail to investigate and address sex discrimination and harassment against students based on their perceived or actual sexual orientation or gender identity

Compliance and Enforcement Trends and Challenges

Feeling the weight of the modern day:

- More case law means more roadmaps to liability
- More regulations and procedural requirements mean more opportunities for missteps (and potential legal consequences)
- Increased anxiety
- Staffing shortages and budgetary constraints
- Process and outcomes are more public, bad behavior has gone viral
- Increasingly complex cases on separate (often intersecting) tracks
- Coordination with multiple campus partners and offices
- Lengthy hearings with cross-examination and relevancy determinations

What to do NOW

- Maintain a compliant policy and process
 - Educate your campus population of what has been updated in your policy—and what definitions, processes, and procedures will remain the same
 - Consider the Title IX-adjacent policies and procedures that need review and update
- Continue—and intensify—training of campus partners
 - Develop good “issue spotters” who know how to respond to concerning observations and information
- Reinforce the seams
 - Clarify the roles and identify key players among your campus partners and have a plan for the intersecting matters and events

What to do NOW

- Tighten your communications with parties and witnesses
 - Review and update as appropriate your notices, cease contact orders, documentation of supportive measures, scripts, etc.
- Look for opportunities to create more uniformity around hearings and related processes
 - Pre-hearing meetings, rules of decorum, thoughtful and necessary uniform hearing procedures, experienced hearing chairs, etc.
- Review your trends and anticipate novel procedural issues
 - Sharing records and information, need for accommodations in processes, facilitating informal resolution, repeat players, intersections with employment policies, study abroad issues, etc.
- Be mindful of the needs for self-care for staff involved in the intake, investigation, and adjudication process

Title IX Trainings Offered by WBD

- ***Upcoming live trainings:***
 - Title IX/VAWA Investigator Training (October 25, 2022)
 - Title IX Hearing Officer and Decision-Maker Training (November 10, 2022)
 - Title IX Appeal Officer Training (2023)
 - Title IX Advisor Training (2023)
 - Title IX Coordinator Training (2023)
- ***Trainings available on demand:***
 - Title IX/VAWA Investigator Training (Fall 2021)
 - Title IX Hearing Officer and Decision-Maker Training (Fall 2022)

Questions? Contact Us.



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